Supreme Court, U.S.
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No. 94-1496

In The

Supreme Court of the United States

October Term, 1994

ALTNA CASUALTY & SURETY COMPANY,
A CONNECTICUT CORPORATION,

Petitioner,

v.

THE HONORABLE JAMES O. ELLISON, JUDGE
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA,
AND BRUCE A. WATSON,

Respondents.

**On Petition For A Writ Of Certiorari
to The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent, Bruce A. Watson, rejects the Petitioners' characterization of the questions presented. The following question regarding jurisdiction should initially be considered:

1) Whether the Petitioner has presented any federal question or other basis upon which this Court should accept a petition for writ of certiorari?

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BRIEF IN OPPOSITION

OPINIONS BELOW

The two unreported written opinions rendered by subordinate courts in this matter were rendered by the Honorable James O. Ellison, Judge of the United States District Court for the Northern District of Oklahoma by Order filed on October 27, 1994, (Appendix A, 1a) and by Circuit Judges Tacha and Brorby of the United States Court of Appeals for the Tenth Circuit by Order filed on December 14, 1994. (Appendix B, 3a).

JURISDICTION

On December 14, 1994, the United States Court of Appeals for the Tenth Circuit entered its Order finding that it did not have jurisdiction to consider an appeal from a remand order of the United States District Court for the Northern District of Oklahoma. No Petition for Rehearing was sought by either party. Petitioner seeks a Writ of Certiorari from that Order.

Petitioner claims jurisdiction pursuant to Title 28 U.S.C. §1254(a), however, Respondent disputes appellate jurisdiction exists pursuant to Title 28 U.S.C. §1447(d).

STATUTORY PROVISIONS

FEDERAL STATUTES

28 U.S.C. §1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action

shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over the claim.

28 U.S.C. §1445. Nonremovable actions.

(c) A civil action in any State court arising under the Workmen's Compensation laws of such State may not be removed to any district court of the United States.

28 U.S.C. §1447. Procedure after removal generally.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

OKLAHOMA STATUTES

TITLE 85 O.S. §3 DEFINITIONS

(7) "Injury or personal injury" means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result therefrom and occupational disease arising out of and in the course of employment as herein defined. Provided, only injuries having as their source a risk not purely personal but one that is reasonably connected with the conditions of employment shall be deemed to arise out of the employment.

STATEMENT OF THE CASE

On August 7, 1991, Respondent, Bruce A. Watson, filed his Employees First Notice of Accidental Injury and Claim for Compensation (Form 3) with the Workers' Compensation Court of the State of Oklahoma alleging an injury to his right knee and low back. On September 13, 1991, the employer and petitioner, who was the workers' compensation insurance carrier for the employer, answered and denied the claim of respondent. Trial was held before the Honorable Ben Choate of the Workers' Compensation Court on December 12, 1991. At trial petitioner presented no witnesses and provided no evidence to show respondent, Mr. Watson, was not injured, was not injured in the manner he claimed, was not in need of medical attention, or that the medical attention he had received, which included arthroscopic surgery to his right knee on June 16, 1991, was not necessary and reasonable. Subsequent to the trial in the Workers' Compensation Court Judge Choate entered an Order finding Mr. Watson had sustained an accidental personal injury arising out of and in the course of his employment and awarded benefits.

The Order of Judge Choate was appealed by petitioner to the Workers' Compensation Three-Judge Panel for review. The Order of Judge Choate awarding benefits to Mr. Watson was unanimously affirmed. At a later date the claim of Mr. Watson was settled on a Joint Petition, which represents a full, final and complete settlement of his workers' compensation claim.

On August 31, 1993, Mr. Watson filed a civil action in the District Court of Delaware County, State of Oklahoma, alleging that petitioner had dealt with him unreasonably and in bad faith during the course of his workers' compensation claim.

On November 3, 1993, petitioner removed the civil action to the United States District Court for the Northern District of Oklahoma. Respondent, Bruce Watson, filed his Motion for Remand on November 12, 1993, asserting that the action would be remanded due to the mandates of Title 28 U.S.C. §1445(c). Mr. Watson's Motion for Remand was heard before the Honorable James O. Ellison on September 30, 1994. Judge Ellison ruled that "the bad faith claims asserted by Plaintiff are so closely tied to the Workers' Compensation Act of the State of Oklahoma that such matters should be addressed by the District Court for the State of Oklahoma", and thereby granted Mr. Watson's Motion for Remand. Judge Ellison's ruling was memorialized in a written Order and filed on October 27, 1994. (App. 1)

Petitioner filed its Notice of Appeal with the United States District Court for the Northern District for Oklahoma on October 27, 1994, and filed its Petition for Writ of Prohibition and/or Mandamus with the United States Court of Appeals for the Tenth Circuit on November 3, 1994. The Court of Appeals directed both parties to file briefs on the jurisdictional issue of "Whether the district court order entered on October 28, 1994, remanding the case to the state court is reviewable on appeal or otherwise?" After both parties briefed the issue the Court of Appeals entered its Order on December 14, 1994, denying

petitioners Petition for Writ of Prohibition and/or Mandamus citing its lack of jurisdiction to review the district court's order as the reason for denying the writ.

It is the December 14, 1994 Order of the United States Court of Appeals for the Tenth Circuit from which petitioner now appeals and seeks a Writ of Certiorari.

ARGUMENT

I.

THE COURT SHOULD DENY THE PETITION AS THERE IS NO JURISDICTIONAL BASIS FOR REVIEW BY THIS COURT

The United States Supreme Court's decisions as to the reviewability and propriety of a remand order is governed by this court's decisions in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976), and *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988).

In *Thermtron,* the Defendants had removed a diversity case to Federal Court in compliance with the jurisdictional and procedural requirements set out in 28 U.S.C. §1441 and 1446. The District Court's written opinion acknowledged that Petitioners had properly removed the case. Nevertheless, the district Judge remanded the case to the state court on the grounds that his docket was crowded, diversity cases were assigned the lowest priority for available trial time, and that Plaintiffs would receive a speedier trial in the state court. While recognizing that Defendants had a statutory right to remove the

action, the Judge believed that the rights must be "balanced against the Plaintiffs' rights to forum of their choice and their right to a speedy decision on the merits." *See Thermtron*, 423 U.S. at 340, 96 S. Ct. at 587. The Defendants understandably appealed.

The question before the Supreme Court in *Thermtron* was whether, in light of the prohibition on review of remand orders set out in 28 U.S.C. §1447(d) the Court of Appeals had jurisdiction to review the district court's order. Answering in the affirmative, the Court reasoned that the ban on review in 28 U.S.C. §1447(d) was to be construed *in pari materia* with the grounds for remand stated in 28 U.S.C. §1447(c).

This Court *initially* held that a district court may not remand a case to state court on discretionary grounds not authorized by 28 U.S.C. §1447(c). *See Thermtron*, 423 U.S. at 345, 351, 96 S. Ct. at 590, 593. *Secondly*, this Court held that the bar against review of remand orders contained in 28 U.S.C. §1447(d) applies only to remand orders authorized by 28 U.S.C. §1447(c). *Id.* at 346, 96 S. Ct. at 590. *Thirdly*, this Court held that where a district court issues a remand order on grounds not authorized by 28 U.S.C. §1447(c), the order is reviewable by writ of mandamus. *Id.* at 352-353, 96 S. Ct. at 593-594. Applying these rules, this Court found that the district court had exceeded its authority under 28 U.S.C. § 1447(c) and that a writ of mandamus should issue to require the district court to entertain the removed action.

In the subsequent case of *Carnegie-Mellon*, this Court revised the first rule and affirmed a discretionary remand

based on the doctrine of pendent jurisdiction. The *Carnegie-Mellon* Court held that where a case is properly removed on the basis of federal question jurisdiction, and the federal question claim drops out of the lawsuit early in the litigation, the district court may, in its discretion, dismiss or remand any remaining pendent state law claims, even though such a remand is not authorized by 28 U.S.C. §1447(c).

In light of these two cases, this Court must decide whether the remand in the instant case was authorized by §1447(c). This Court, in *Thermtron*, emphasized that review was available only because a district court remand order did not purport to remand on a ground authorized by §1447(c). However, in the case at bar, Judge Ellison in his remand order determined that " . . . the bad faith claims asserted by Plaintiff are so closely tied to the Workers's Compensation Act of the State of Oklahoma that such matters should be addressed by the District Court for the State of Oklahoma, and therefore, Plaintiff's Motion for Remand should be and is hereby granted." It should be noted that while Judge Ellison did not specifically cite Title 28 U.S.C. §1445(c), it is clear he was relying upon that statute as his authority for the remand by his statements referring to the Oklahoma Workers' Compensation Act. Petitioner in this matter also realizes §1445(c) was the authority relied upon by Judge Ellison as that statutory provision was the only statutory authority presented in support of the Motion for Remand. No other authority was presented and no other ground was given for the remand order.

A case directly on point with the present case is *William C. Cooper v. National Union Fire Insurance Company*

of Pittsburgh, Pennsylvania; and G.A.B. Services, Inc., Case No. 90-C-2-B, D.C.N.D. of Oklahoma, Order entered remanding on June 7, 1990. (Appendix C, 5a). In that case, Plaintiff brought a cause of action for insurance bad faith due to the non-payment of benefits ordered by the Workers' Compensation Court. The cause of action was initially filed in the state district court and removed by the Defendant to the United States District Court for the Northern District for Oklahoma. Judge Brett entered his Order remanding the action to the state district court after "[H]aving determined Plaintiff's claims arise under the Workers' Compensation laws of the State of Oklahoma, the Court is logically drawn to the conclusion that removal from the state court was improvident and remand should be granted." Defendants appealed the remand order of Judge Brett to the United States Court of Appeals for the Tenth Circuit and were assigned Case No. 90-5141. The Court of Appeals, through Circuit Judges McKay, Baldock and Ebel, entered an Order, filed on March 1, 1991, (Appendix D, 8a) finding that the remand order of Judge Brett was "not reviewable by appeal or otherwise where the remand is based on the district court's determination that it is without jurisdiction. *See* 28 U.S.C. §1447(d); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) (per curiam); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976)." Just as Defendant did in the present action, Defendant in the *Cooper* case filed a Petition for Writ of Certiorari with the United States Supreme Court. Defendant's Petition for Certiorari was denied by this Court in Case No. 91-6 by way of Order filed on October 7, 1991.

In the present matter, just as in the *Cooper* action cited above, once the United States District Court for the Northern District of Oklahoma was presented with statutory authority which precluded it from assuming jurisdiction, 28 U.S.C. §1445(c), it had no alternative but to find that removal was improvidently granted requiring it to remand the case to the state court from which it was removed. Since the district court followed 28 U.S.C. §1445(c) in determining that removal was improvidently granted, the United States Court of Appeals for the Tenth Circuit was precluded from reviewing the district court's decision pursuant to 28 U.S.C. §1447(d). The Court of Appeals, as well as the United States Supreme Court, lacks jurisdiction to review the remand order of the district court and therefore Petitioner is not entitled to the writ it seeks.

II.

TITLE 28 U.S.C. §1447(D) IS NOT UNCONSTITUTIONAL

The removal statutes grant a right of access to a federal forum. The motivating concern for granting that statutory right was to protect litigants against local prejudice, influence and discrimination. If a district court judge were permitted to order a case remanded on discretionary grounds, such as his docket was too crowded, and the restriction on appeals from remand orders was intact, Petitioner may have a point that it does not have equal access to the appellate court for such abuses of discretion. However, a district court has virtually no discretion in determining when a case may be remanded. All

federal district courts are bound by the statutory provisions of 28 U.S.C. §1445, which specifically sets out what species of action may not be removed. If a civil action falls into one of the categories set out in §1445, it must be remanded and that remand order is not subject to review on appeal or otherwise pursuant to §1447(d) as there cannot have been an abuse of discretion. The potential for abuse of discretion is not present where the remand is based on a non-discretionary ground such as the instant case pursuant to 28 U.S.C. §1445(c). Given the narrow scope of what actions may be remanded, Petitioner is not deprived of its Constitutional right of due process as the present case was not remanded on discretionary grounds that may benefit from appellate review, but rather was remanded on a narrow statutorily provided ground that would not benefit from further review or discussion by an appellate court. The doorway into the federal district court by way of removal is very broad, the pathway out of the federal district court by way of remand is extremely narrow. If a particular civil case meets the requirements that will allow it to leave the federal district court on that narrow path, there is no need for appellate review and there has been no violation of a party's Constitutional rights as there has been no abuse of discretion by the district court.

CONCLUSION

In view of the foregoing and for the reasons stated herein, the Respondent respectfully requests that this Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel of Record for Respondent

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRUCE A WATSON, Plaintiff, -v- THE AETNA CASUALTY AND SURETY COMPANY, a Connecticut Corporation, Defendant.	)	No. 93-C-985-E (Filed Oct. 24, 2994)

ORDER

COMES ON for consideration and hearing before the undersigned Judge of the United States District Court on the 30th day of September, 1994, Plaintiff's Motion for Remand. The Court, being well and fully advised in the premises, finds that the bad faith claims asserted by Plaintiff are so closely tied to the Workers' Compensation Act of the State of Oklahoma that such matters should be addressed by the District Court for the State of Oklahoma, and therefore, Plaintiff's Motion for Remand should be and is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above styled and numbered cause be and is hereby remanded to the District Court of Oklahoma, in and for Delaware County.

/s/ JAMES O. ELLISON
Honorable James O. Ellison
Judge of the United States
District Court

APPROVED AS FOR FORM AND CONTENT:

/s/ Bryce A. Hill
Bryce A. Hill
Counsel for Plaintiff

/s/ R. Butler, Jr.
James K. Secrest, II
Roger N. Butler, Jr.
Counsel for Defendant

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AETNA CASUALTY & SURETY COMPANY, a Connecticut corporation,	)	
Petitioner,	)	No. 94-5201
-v-	)	(Filed Dec. 14, 1994)
HONORABLE JAMES O. ELLISON, Judge of the United States District Court for the Northern District of Oklahoma,	)	
Respondent.	)	

ORDER

Before TACHA and BRORBY, Circuit Judges.

This is an original proceeding in the nature of mandamus. Petitioner seeks an order directing the district court to vacate its order remanding case No. 93-C-985-E to the state court from which the case had been removed and to exercise jurisdiction over the case.

Upon consideration thereof, the petition is denied. The district court remanded the case because of a defect in removal procedure in that the case was removed in

violation of 28 U.S.C. § 1445(c). The court therefore does not have jurisdiction to review the district court's order. 28 U.S.C. § 1447(d); *Gravitt -v- Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (per curiam).

Entered for the Court

PATRICK FISHER, Clerk

By /s/ Barbara Schermerhorn
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM C. COOPER, Plaintiff, -v- NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; and G.A.B. SERVICES, INC., Defendants.	)	Case No. 90-C-2-B (Filed Jun. 7, 1990)

ORDER

This matter comes on for consideration upon the Motion to Remand filed by William C. Cooper. Additionally considered is the Motion to Dismiss, filed by the Defendants, National Union Fire Insurance Company of Pittsburgh, Pennsylvania and G.A.B. Services, Inc.

This action was initially filed in the District Court for Tulsa County, State of Oklahoma, the Plaintiff, alleging bad faith insurance practices and intentional/negligent infliction of emotional distress. The matter grew out of a Workers' Compensation claim made by Plaintiff due to an injury suffered while an employee of Loffland Brothers, a corporation located in Tulsa, Oklahoma, Loffland Brothers was insured by Defendant National Union Fire Insurance Company, with Defendant G.A.B. administering the workers' compensation benefits under the policy.

Plaintiff alleges Defendants failed to continue payments due him under the Workers' Compensation Award.[1]

Defendants removed the matter to this Court alleging diversity of citizenship and an amount in dispute being in excess of $50,000.00. Defendants simultaneously filed a Motion to Dismiss based upon lack of subject matter jurisdiction. The gravamen of Defendants' dismissal effort is that the Workers' compensation Court of the State of Oklahoma has exclusive jurisdiction of cases arising out of state workmen's compensation laws.

Defendants have positioned themselves contradictorily. Either their removal from state court was improper or their current motion to dismiss is meritless.

Defendants could only validly remove this matter to the federal court if it was not an action arising under the workmen's compensation laws of the State of Oklahoma. Civil actions arising under the state workmen's compensation laws are nonremovable. 28 U.S.C. § 1445(c). Diversity of citizenship does not abrogate § 1445.[2] However, it has been held § 1445 does not prevent removal from a state court of an action which involves another state's workmen's compensation laws. See *Jackson -v- Diamond M Co.*, (D.C. Miss 1983), 575 F. Supp. 995, where an action in

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[1] Plaintiff was awarded permanent disability benefits for 317.5 weeks at a rate of $160.00 per week, a total of $51,752.50, plus medical benefits and vocational rehabilitation benefits.

[2] Notwithstanding this, had the case originally been lodged in federal court, citizenship diversity would have been sufficient to vest the court with jurisdiction to hear the matter. *Prescott -v- U.S.*, D.C. Nev. 1981, 523 F.Supp. 918, affirmed 731 F.2d 1388.

a Mississippi state court arising under the workmen's compensation laws of Louisiana was held removable to federal district court. The *Jackson* Court concluded that § 1445, prohibiting removal of workmen's compensation cases, applied only to actions arising under that form state's compensation laws.

In the instant matter, the threshold issue is whether Plaintiff's claim arises under the workmen's compensation laws of the State of Oklahoma. Apparently there is no dispute that plaintiff has received all of the compensation award due him.[3] Plaintiff argues that facts giving rise to Plaintiff's claims for bad faith insurance practices and intentional infliction of emotional distress are directly connected to and arose under the payment of a Workers' Compensation Order. The Court agrees. In a similar case, the Court ruled that the Oklahoma Workers' Compensation Act provides the exclusive remedy for all claims of an injured worker until the Oklahoma legislature provides otherwise. *Joseph Edwin Roberts, et al. -v- Commercial Union Insurance Company,* Case No. 88-C-540-B, D.C. N.D. of Oklahoma, Order entered October 20, 1988.

Having determined Plaintiff's claims arise under the Workers' Compensation laws of the State of Oklahoma,[4]

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[3] The Workers' Compensation Court entered an Order requiring the insurance carrier to pay the remainder of the award in a lump sum which the Court presumes, has been done in that the parties treat the matter a *fait accompli.*

[4] Defendant attempts to tenuous distinction between a claim arising under the Workers' Compensation laws and a claim arising out of a Workers' Compensation suit. The Court finds this distinction, under these facts, disingenuous.

the Court is logically drawn to the conclusion that removal from state court was improvident and remand should be granted.

It will be the Order of the Court that this matter be and the same is hereby REMANDED to the District Court for Tulsa County. Defendant's Motion to Dismiss is therefore OVERRULED as moot.

IT IS SO ORDERED this 7th day of June, 1990.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM C. COOPER, Plaintiff-Appellee,	)	
-v-	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, Defendant,	)	No. 90-5141
and	)	
G.A.B. SERVICES, INC., Defendant-Appellant.	)	

ORDER

(Filed Mar. 1, 1991)

Before McKAY, BALDOCK and EBEL, Circuit Judges.

This matter comes on for consideration of the appellee's motion to dismiss and request for sanctions and the response filed thereto.

Upon consideration thereof, the motion to dismiss is granted. A remand order is not reviewable by appeal or otherwise where the remand is based on the district court's determination that it is without jurisdiction. See 28 U.S.C. § 1447(d); *Gravitt -v- Southwestern Bell Telephone*

Co., 430 U.S. 723 (1977) (per curiam); *Thermtron Products, Inc. -v- Hermansdorfer*, 423 U.S. 336 (1976). The appellee's request for sanctions is denied.

APPEAL DISMISSED.

Entered for the Court
/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk